United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original

77-7009

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-7009

WILLIAM R. VAN GEMERT, ET AL.,

Plaintiffs-Appellants,

—against—

THE BOEING COMPANY AND THOMAS R. WILCOX,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This consolidated class action was brought in the federal courts pursuant to various provisions of the federal Securities Acts and the Trust Indenture Act of 1939.

Plaintiffs were unregistered holders of The Boeing Company's ("Boeing") 4 1/2% Convertible Subordinated Debentures due July 1, 1980 (the "Debentures") who failed to exercise their privilege to convert their Debentures into two shares of the common stock of Boeing before such privilege terminated on March 29, 1966. Debentureholders who failed to convert their Debentures before the privilege terminated thus lost the market appreciation of their Debentures.

As a consequence, Plaintiffs brought this action, claiming, among other things, that the notice given by Boeing of the call of the Debentures was inadequate in contravention of both federal and common law, that Boeing had been unjustly enriched as a result, and that Boeing's Indenture with respect to notice was "unconscionable" (A 9-18, 19-23, 25-26).*

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* References to "A -" are to the Appendix herein. Plaintiffs also claimed that Boeing's computation of the conversion rate had been improper and that they had an implied civil right of action under the Securities Acts as a result of Boeing's alleged violation of the New York Stock Exchange Manual (A 19-20). The District Court found no substance in either claim (A 88-89). The Court of Appeals affirmed the District Court's dismissal of the claims based upon the conversion rate (A 112-116) and although it determined that Boeing had not complied with the Stock Exchange Manual, such claims did not form the basis of any liability in this action but were merely found sufficient for jurisdictional purposes (A 100-105).

After trial of this case, the District Court dismissed the complaint, determining that Plaintiffs had established no federal or other claims, but that Boeing had fully complied with the terms of its Indenture and that notice of the call was reasonable, valid and adequate (A 88-89). Boeing's rationale for declining to extend the the date when conversions could be made was to avoid subjecting itself to an action for corporate waste in accordance with then existing law - not to take advantage of Plaintiffs (A 52-56).

Plaintiffs appealed from the dismissal of their claims and on July 14, 1975 the Court of Appeals reversed the finding of the District Court that notice of the call of the Debentures had been adequate (A 106-12).

The Rationale of This Court's Decision

In fashioning the appropriate remedy for Plaintiffs, this Court made in essence an equitable determination between the rights of the equity and debt owners of Boeing, since "to a large extent those who were benefited [i.e., shareholders] one might almost say unjustly enriched, will be the ones who pay appellants' loss" (A 111). The purpose of the decision was to permit the Debentureholders to take advantage of the opportunity originally contemplated for them - to be placed in the position of an equity holder.

Pursuant to this rationale, this Court held that despite the fact that Boeing had fully complied with the notice requirements found in its Indenture, Boeing had failed to give additional notice of the call in excess of that required by its Indenture, which Debentureholders had a right to expect (A 107). This Court also held that Boeing had an obligation to inform Debentureholders that the consequences of registration of their Debentures would have been mailed notice of any such call (A 106). This Court thereupon remanded the case to the District Court for a determination of the amounts to which Debentureholders were entitled.

In so doing, this Court indicated that since the class of Debentureholders who had failed to convert was to be placed in the same position as those who had timely converted, that Boeing alone would have the option of determining whether each Debentureholder would receive Boeing stock or its cash equivalent (A 111-112). This Court further determined that the parties who in fact had benefited from the Debentureholders' failure to convert were the equity holders of Boeing whose interests were not diluted to the extent they otherwise could have anticipated (A 111).

The Order and Judgment Appealed From

By Order and Judgment entered December 30, 1976 (A 364-65) supported by an opinion dated November 8, 1976 (A 352-61) the District Court, Hon. Sylvester J. Ryan, determined that the class of all holders of Debentures as of March 29, 1966 were entitled to receive the aggregate sum of $3,289,359 should all members file appropriate proofs of claim, with interest from the date of the Order. Judge Ryan rejected Boeing's contention that Debentureholders who chose to redeem their Debentures after March 29, 1966 had elected among inconsistent rights under their Debentures and were not entitled to share in the award (A 354-57). Boeing took no appeal from this determination. Plaintiffs have taken this appeal from that Order and Judgment (A 367-368). They contend that the District Court's denial of prejudgment interest was unwarranted and that its discretion was abused; that the District Court's computation of damages based upon the last date when the conversion privilege terminated was incorrect; and that those class members who file proofs of claims are entitled to receive, in addition to sums representing their own specifically determined claims, the share of any class member who fails to file a claim.

In their briefs* on appeal, Plaintiffs seek essentially to change settled law and to have this Court reweigh the alleged equities of this case in their favor, solely in order to maximize amounts due to the greatest possible extent. Plaintiffs have, however, little support for their positions.

Plaintiffs first contention, that they are entitled to prejudgment interest as a matter of law is not sustained by the applicable precedents. Their additional claim that Judge Ryan abused his discretion in denying them prejudgment interest stands only on the bare claim that the equities in this case, despite Judge Ryan's careful consideration of them, should have been determined to be in their favor.

Plaintiffs second contention, that they have a legal right to maximize the amounts they are entitled to recover by choosing an arbitrary date upon which Boeing's stock reached its highest value similarly has no legal support.

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* Although the class of Plaintiffs is represented by a committee of three counsel, each has submitted a brief covering, with one exception, identical ground. Only the firm of Kass Goodkind Wechsler & Gerstein has briefed the issue of whether class members who file claims for sums they are entitled to receive are entitled to receive in addition the amounts to which non-claiming class members would be entitled. References to the Plaintiffs' briefs shall be designated either as "Kass Br.-", "Steinman Br.-" or "Nathan Br.-", as the case may be.

Plaintiffs' final claim, that class members entitled to recover more than the amount of their actual harms as determined by the District Court through the device of the "fluid recovery" has been definitively rejected by this Court and the Supreme Court of the United States. Moreover, since this issue forms no part of the District Court's Order and Judgment, it is not properly before this Court.

Counterstatement of the Issues

1. Whether in an action which is neither one in contract nor tort but involves in effect an equitable adjudication between the debt- and stock- holders of a corporation by creating a new right to notice, interest in accordance with New York State's prejudgment interest statute is mandated.

2. Whether, if the award of such interest is not mandated but discretionary, the District Court abused its discretion in denying it.

3. Whether the amount to be paid to Debentureholders is to be as of the date when the conversion privilege terminated - or as of some arbitrary date of Plaintiffs' choosing thereafter when Boeing stock reached its highest value.

4. Whether members of a class entitled to recover a discrete amount and who in fact claim such amount - which is computed to make them whole - are also entitled to share among themselves amounts not claimed by other class members.

Statute Involved

Section 5001(a) of the New York Civil Practice Law and Rules (McKinneys Supp. 1976-77) provides that:

> "(a) Actions in which [prejudgment interest is] recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

ARGUMENT

I

THE DENIAL OF PREJUDGMENT INTEREST WAS WITHIN THE DISCRETION OF THE DISTRICT COURT

In their briefs, Plaintiffs essentially claim that the District Court applied federal law to the question of whether they were entitled to prejudgment interest on individual amounts awarded to them. Plaintiffs argue that New York, not federal law applies to this question and that the District Court was without discretion on this issue, but that such interest was statutorily mandated (Kass Br. 7-9; Steinman Br. 4-14; Nathan Br. 5-16). Plaintiffs further argue that even if the District Court had such discretion to deny prejudgment interest, such discretion was abused (Kass Br. 9-10; Steinman Br. 14-18; Nathan Br. 16-17). Boeing submits that the District Court's decision with respect to prejudgment interest was entirely correct and should be affirmed.

A. The Bases for the District Court's Denial of Prejudgment Interest

In a carefully thought-through opinion, the District Court determined that the mandatory provisions of the New York statute with respect to prejudgment interest were inapplicable to this case and that, after reviewing

all facts, the equities demanded that prejudgment interest not be imposed upon Boeing in favor of Plaintiffs (A 360-61). The District Court reasoned that the claims of the Plaintiffs as upheld by the Court of Appeals were essentially equitable in nature and involved in essence adjudicating between the rights of Boeing's debt and equity holders. Moreover, the District Court held that the Plaintiffs' claims did "not sound in tort or even in contract is clear" (A 358) since the Court of Appeals found that:

> "defendants had not breached the Indenture Agreement - the notice 'conformed to the requirements of the Indenture.' (Van Gemert v. Boeing Co., 520 F.2d 1373, 1383) - but rather that they had misconstrued their duties under it as to the 'reasonable notice' in excess of that required by the Indenture." (Id.)

Nor, the District Court noted, had the Court of Appeals found "that Boeing had taken or interfered with any property of plaintiffs" (A 361).

Having found that this Court had applied an equitable standard (A 358) the District Court determined that the mandatory aspects of New York State's prejudgment interest statute did not apply (CPLR § 5001(a) (McKinney's Supp. 1976-77)), the District Court further held that it would be "less than equitable" to apply the discretionary aspects of the New York statute, especially where Boeing "could not have anticipated their breach of duty" (A 358, 360-61).

Given that the equitable rights created by this Court were entirely novel in nature and that the mandatory provisions of New York's statute on prejudgment interest were found to be inapplicable, the Court then was free to exercise its discretion - as either a matter of New York or federal law - in deciding whether or not to award prejudgment interest. The Court found in view of the equitable nature of Plaintiffs' claims, the new and unforeseeable nature of the rights accorded to Plaintiffs by the Court of Appeals, and the absence of any illegal profits inuring to Boeing, that in its discretion and in response to consideration of fairness, prejudgment interest would be denied (A 360-61).

B. Plaintiffs' Erroneous Claims

The basic, if erroneous, argument of Plaintiffs is that the District Court wrongly premised its decision that the award of prejudgment interest was a matter of discretion on its finding that federal jurisdiction was premised on the federal Securities Acts. Plaintiffs assert that jurisdiction is not the controlling factor, but rather, the source of the right accorded to Plaintiffs which they claim is one in contract under state law. Thus, Plaintiffs claim that the mandatory provisions of New York's prejudgment interest statute are applicable (Steinman Br. 5; Nathan Br. 5-9).

In putting forth this position, Plaintiffs, we submit, misread the opinions of the District Court and of this Court and are placed in the anomalous position of disowing their own co-counsel's claim to the District Court in connection with this issue, that Boeing "ran afoul" of the Securities Acts (In its brief the firm of Nathan, Mannheimer, Asche, Winer & Friedman disavows all connection with the statement made by its fellow co-committeemen (Nathan Br. 13)). The District Court did not in its opinion state that because jurisdiction was premised on federal statutes, the New York State prejudgment interest statute did not apply. The District Court discussed the jurisdictional question only with respect to the issue of the amounts to be awarded to Plaintiffs to compensate them for their loss and the date to be selected for determining the value of the stock Plaintiffs would have received had they received notice (A 358). To be sure the District Court did point out that Plaintiffs themselves claimed that the federal Securities Acts controlled certain aspects of this litigation, specifically whether Debentureholders who had redeemed could have been held to have waived their rights to convert (A 360). The Court then noted, in view of Plaintiffs' own position, it would not be illogical to apply the federal rule that such interest is discretionary. However,

it is unalterably clear from the District Court's opinion that it found the mandatory provisions of New York's specific statute on prejudgment interest inapplicable and that, irrespective of whether New York or federal law applies, the award of prejudgment interest is discretionary, not mandatory.

C. The Award of Prejudgment Interest Was Within the Discretion of the District Court

Plaintiffs brought this action (and all of the underlying actions which were consolidated into the consolidated complaint) in the federal courts pursuant to various provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933 as well as under various provisions of the Trust Indenture Act of 1939 (A 3). Although the Court of Appeals has held that Plaintiffs' claims of Boeing's violations of Section 10 of the Securities Exchange Act of 1934 were sufficiently "colorable" to confer pendent jurisdiction of the federal courts over the non-federal claims asserted by Plaintiffs, this Court did not decide any substantive questions of federal law; rather its grounds for decision were based on the creation of a new right under New York law (A 100-05, 106-12). In such a situation, a federal court in New York would apply the law of the State of

New York to the question of whether prejudgment interest should be awarded.* Spang Indus., Inc. v. Aetna Casualty & Surety Co., 512 F.2d 365, 371 (2d Cir. 1975); Marx & Co. v. Diners' Club, Inc., 405 F.Supp. 1, 3 (S.D.N.Y. 1975). However, the New York statute which Plaintiffs assert controls is not, under the facts of this case, apposite.

Plaintiffs claim that their case is a breach of contract or conversion action and that this Court is without discretion to deny prejudgment interest. As noted by the District Court, "[t]he Court of Appeals found that defendants had not breached the Indenture Agreement (A 358) nor had Boeing converted any property belonging to Plaintiffs (A 361), but only that it had failed to give notice in excess of that required by the Indenture which the Debentureholders had a right to expect (A 107). Nor did the Court of Appeals determine that Boeing's wrong to the Plaintiffs involved any sort of taking of or interference with property, nor any fraud nor breach of fiduciary duty. See, e.g. Ruderman v. United States, 355 F.2d 995, 998-99 (2d Cir. 1966) (In a case involving evidence of

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* Plaintiffs make much of the point that Boeing has "conceded" that New York law applies (Steinman Br. 12-14; Nathan Br. 9). Boeing has taken the consistent position that the decision of the Court of Appeals as to notice was grounded in state not federal law.

actual fraud, the Court of Appeals, construing New York law, allowed interest from an earlier date than otherwise applicable). At best, the wrong to Plaintiffs was a breach of a duty to give adequate notice which did not even result in the enrichment of Boeing itself. Instead this Court specifically noted that the beneficiaries of the inability of the Plaintiffs to convert their Debentures into shares of Boeing common stock were Boeing's common stockholders whose holdings were not diluted to the degree that otherwise would have occurred had there been 100% conversion (A 111). In such case, interest has been denied. In Re Sabre Shipping Corp., 299 F. Supp. 97, 101-02 (S.D.N.Y. 1969). (Principal, held responsible for its agent's failure to return a duplicate payment made to latter "has not had the benefit of the money for its our own use. In such circumstances the payment of interest need not be compelled, and we conclude that the Referee's failure to allow any interest was proper".) (Construing CPLR § 5001(a)).

In view of the fact that the right to notice implied by this Court in favor of Plaintiffs was never before determined to exist by any Court in the State of New York or elsewhere and because its existence could not have been reasonably anticipated in 1958 when the

Debentures were issued or in 1966 when called, it is submitted that the mandatory provisions of Section 5001(a) are inapplicable, that the award of prejudgment interest is not a matter of right and that it would be punitive to award it in the circumstances of this case.

Moreover, this Court, in order to adjudicate the equities between the two classes of debt and equity owners, determined that Debentureholders had a right to notice in excess of that provided by the Indenture, and in effect reformed that instrument to make such provision (See Note, 89 Harv. L. Rev. 1016, 1025 (1976) ("[n]o New York Court appears similarly to have rewritten the provisions of a corporate debt instrument"). Reformation of a written instrument has long been held to be an equitable principle applied in changing some aspect of a written instrument which imports a legal obligation in order to make it conform to the real intentions of the parties. See Brandwein v. Provident Mut. Life Ins. Co., 3 N.Y.2d 491, 494, 168 N.Y.S.2d 964, 967 (1957), and cases cited in 6 N.Y. Jur. §§ 23-41). Here the parties claimed that the terms of the Indenture relating to notice were "unconscionable" (A 25) and thus this Court exercised its equitable powers by reforming that instrument in order to permit Plaintiffs to convert their Debentures. In sum, this Court did fashion an equitable remedy in connection with Plaintiffs' contract claims. Given the equitable

nature of Plaintiffs' contract claims, the mandatory provisions of CPLR § 5001(a) are inapplicable.

The Supreme Court has held "that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 352 (1939) quoted with approval in affirming judgment for recovery of § 16(b) short-swing profits without interest in Blau v. Lehman, 368 U.S. 403, 414 (1962). Since this case does not involve elements of fraud, breach of fiduciary duties, nor any special benefit to Boeing, monetary or otherwise, it is submitted that denial of prejudgment interest is not in any sense inequitable but rather is required, as the District Court has held in the exercise of its discretion, by principles of fundamental fairness.

Indeed, it should be pointed out that Boeing's refusal to convert into common stock any of its Debentures submitted after the termination date* was made in the utmost good faith, with the necessity of consideration for the

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* Conversions were permitted for a short period after March 29, 1966 of Debentures not received by the Indenture trustee before that date, if a valid reason for delay was given.

respective rights of the two groups of security holders, and to this end Boeing sought and relied upon the opinions of two outside law firms that permitting Debentureholders to convert after the date of termination of the privilege would subject it to possible shareholders' suit for corporate waste and breach of fiduciary duty. See Letter Dated April 25, 1966, from Holman, Marion, Perkins, Coie & Stone (A 52-53), and Letter dated April 27, 1966 from Davis Polk Wardwell Sunderland & Kiendl to Boeing (A 54-56). In a very real sense, Boeing stood as the arbiter between the competing rights of its debt and equity holders.

Plaintiffs rely principally on this Court's decision in Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973) in support of their claims that interest is mandatory under New York law. That case is, however, totally distinguishable. In Spector the defendant attorney had been found to have acted negligently in breach of his fiduciary duty. In reversing the District Court's denial of prejudgment interest based essentially on its finding that delays in the case were attributable to the plaintiff, the Court of Appeals found that defendants' conduct had in fact been a "tortious interference with property rights" albeit negligent in nature and thus fell, along with intentional infliction of such harm,

within the scope of the New York statute. 485 F.2d at 482. The issue in the case was simply whether negligent as well as intentional torts were covered by the New York statute. In the case at Bar there has been no finding or tortious interference with property - negligent or otherwise and no finding of breach of any contract. Since this case does not fit within the confines of the statute, the District Court was entitled to exercise its discretion.

D. The District Court Did Not Abuse its Discretion in This Case

Plaintiffs claim that the District Court wrongly evaluated the equities in this case. They claim that since Boeing has had the use of "their" money justice requires that Boeing pay for it (Kass Br. 9-10; Steinman Br. 14-18; Nathan Br. 16-17). Plaintiffs could, of course, have had the use of their original investment by redeeming their Debentures, as indeed most have (A355).

The rights accorded to Plaintiffs in this case were novel and could not have been anticipated by Boeing. The wrongs found to have been committed by Boeing neither involved a breach of its Indenture nor did they involve any illegal profits to Boeing (A 360-61). The true beneficiaries of Boeing's refusal to convert the Debentures of Plaintiffs into shares of Boeing stock were found to

be the other shareholders of Boeing (A 111, 360-61).

The bald assertion by Plaintiffs that it would have been fairer for the District Court to have exercised its discretion differently does not meet the standard of abuse of discretion necessary to supplant the District Court's determination, but simply suggests that the District Court could have decided differently. It cannot be said that the determination of the District Court was "so unfair or so inequitable" as to require this Court to upset it. Blau v. Lehman, supra, 368 U.S. at 414. Cf. Manhattan-Ward, Inc. v. Grinnell Corp., 490 F.2d 1183, 1186 (2d Cir. 1974).

The equities of this case were clearly and thoughtfully evaluated by the District Court and determined to weigh in Boeing's favor. Plaintiffs suggest no new reasons for shifting the balance in their favor for, we submit, there are none.

II

THE DISTRICT COURT'S DETERMINATION THAT AMOUNTS DUE TO PLAINTIFFS ARE TO BE COMPUTED AS OF MARCH 29, 1966 AND NOT ON A THEORETICAL "HIGHEST PRICE DATE" WAS CORRECT

The District Court rejected Plaintiffs' claim that they were entitled to maximize the amounts due by valuing the two shares of Boeing stock into which their Debentures were convertible on the basis of their value at some theoretical "highest price date" following the termination of their conversion rights. Instead the District Court held that:

> "[i]f plaintiffs have a claim, it was to convert by March 29, 1966, not at a later date when the stock may have risen in value.
>
> The measure of damages is to compensate plaintiffs for their loss as of March 29, 1966, not at a later date. To compensate them at a higher price would put them in a preferential position with respect to those bond holders who converted on time. That is not the purpose of a class suit. In fact the Court of Appeals stated that on remand Boeing might issue stock 'which is what the plaintiffs would have had if they received notice of the redemption call, and one of the purposes of the redemption was to enable the company to exchange debt for equity capital.' (Footnote 23, p. 1385)" (A 358-59).

In putting forth their claims that the class members who missed the call of the Debentures are now entitled

to receive something more than those who heeded the call;* Plaintiffs claim that Boeing's failure to convert their bonds after March 29, 1966, the date when the conversion privilege terminated, somehow transforms this action into an action for conversion even though no such claim was ever asserted in the consolidated complaint. In this new found endeavor, Plaintiffs take the position that because they assert a claim for conversion, they are entitled to choose any date within 30 days of the alleged "conversion" on March 29, 1966 of their Boeing Debentures in which Boeing's common stock was selling at its highest price, in order to determine damages (Kass Br. 10-13; Steinman Br. 18-20; Nathan Br. 9-13).** Not surprisingly, if the April date selected by plaintiffs is used as the appropriate one on which to value Boeing's common stock, damages would increase enormously, since on April 14, 1966, one share of Boeing stock traded at a price nearly $25

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* On March 29, 1966, the day when the conversion privilege terminated, two shares of Boeing Common Stock were worth $316.25. Since each $100 in face amount of Debentures was worth $103.25, each Debentureholder lost, as of March 24, 1966, $213.00 per face amount of Debentures. Plaintiffs, however, pick April 14, 1966 as the appropriate day to value what each Debentureholder lost. On that date, two shares of Boeing stock were worth $364. Hence Plaintiffs contend that each Debentureholder is entitled to receive $250.75 per $100 in face amount of Debentures. Thus Plaintiffs contend that they are entitled to $4,026,762.25, nearly $1 million more than the District Court found (Kass. Br. 13; Steinman Br. 20; Nathan Br. 13).

** Plaintiffs cite several New York stock conversion cases in support of their theory that the "highest price

greater than the price at which a share traded on March 29, 1966. Assessing damages on such a theoretical basis would result in an unwarranted windfall to Plaintiffs, whose claim, in any event, is not one for conversion, or indeed breach of contract, as Plaintiffs also suggest, but rather involves the assertion of new rights never before recognized by a New York court or for that matter, any other American court.

In reversing the District Court's finding that Boeing's notice of the call of the Debentures had been "reasonable, valid and adequate" (District Court Opinion dated November 28, 1973 at p. 21), this Court held that the notice given by Boeing, although it

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date" controls the measure of damages. It should be pointed out that the rule in each of the cases has not been correctly stated by Plaintiffs (see, e.g., Kass Br. 11-12). The cases in fact stand for the proposition that "the measure of damages for conversion of stock certificates is the cost of replacement within a reasonable period after the discovery of the conversion regardless when the conversion may have occurred." Hartford Accident & Indemnity Co. v. Walston & Co., 22 N.Y.2d 672, 673, 291 N.Y.S.2d 366, 367 (1968). See also Mayer v. Monzo, 221 N.Y. 442, 446, 117 N.E. 948, 950 (1917); Jones v. National Chautauqua County Bank, 272 App. Div. 521, 528, 74 N.Y.S.2d 498, 504 (4th Dept. 1947). Thus, for each plaintiff entitled to recover damages, a finding would have to be made as to when he learned of the "conversion," since his individual ability to replace the stock "converted" could only be measured from such notice. Obviously, to require this kind of proof would involve an enormously complicated trial and negate many of the benefits of class action treatment. Plaintiffs suggest of course that "most" Debentureholders learned of the call of the Debentures by June 1966 (Nathan Br. 9-10). This is Plaintiffs' surmise only and does not support in any event their choice of an April date.

"conformed to the requirements of the Indenture", had "two deficiencies" (A 106). First, it did not "adequately apprise the debentureholders what notice would be given of a redemption call" (Id.). That is, the Debentures and the prospectus pursuant to which the Debentures were issued, while indicating that the Debentures could be registered, did not spell out that as a consequence thereof a Debentureholder would receive mailed notice of any call at his registered address. The second deficiency pointed to by the Court of Appeals was the newspaper notice of the call itself which was termed "inadequate" (Id.). This Court suggested, but did not decide, what additional means of giving notice besides the newspaper publication called for in the Indenture and other publicity given of the call would have been legally sufficient (A 108). The Court of Appeals merely implied a "duty of reasonable notice" in excess of that required by the Indenture and in effect reformed the Indenture to add that provision (A 107). See Note, 89 Harv. L. Rev., supra, at 1025.

It has long been held that the refusal of a corporation to convert its bonds in accordance with its indenture constitutes a wrong which gives rise to a remedy in damages. P.W. Brooks & Co. v. North Carolina Public Service Co., 32 F.2d 800, 802 (M.D.N.C. 1929); Lisman v. Milwaukee L.S. & W. Ry. Co., 161 F. 472, 475-76 (E.D. Wis.

1908), aff'd, 170 F. 1020 (7th Cir. 1909), cert. denied 214 U.S. 520 (1909); Mueller v. Howard Aircraft Corp., 329 Ill. App. 570, 70 N.E. 2d 203, 207 (1946); Chaffee v. Middlesex R.R. Co., 146 Mass. 224, 16 N.E. 34, 43 (1880); Bratten v. Catawissa Ry. Co., 211 Pa. 21, 60 A. 319-320 (1905); John Hancock Mut. Life Ins. Co. v. Worcester R.R. Co., 149 Mass. 214, 21 N.E. 364 (1889). It has also been long held that such damages are measured without question as of the date of the wrong, in this case March 29, 1966. Lisman v. Milwaukee, L.S&W. Ry., supra, 161 F. at 479-80; Mueller v. Howard Aircraft Corp., supra, 70 N.E. 2d at 207; Chaffee v. Middlesex R.R., supra, 16 N.E. at 43-44; Berle, Law of Corporation Finance, 137 (1928). However, it should be pointed out that the Court of Appeals did not hold that Boeing had breached the Indenture but rather that the wrong to the Plaintiffs was its failure to give notice in excess of that provided by the Indenture, a failure to meet the "reasonable expectations as to notice" of the Debenture-holders which Boeing had a "duty" to protect (A 107). The implied right to notice created by this Court never before had been recognized by any New York court and certainly could not have been reasonably anticipated by Boeing when the Indenture and Debenture were drafted and executed in 1958 in accordance with the then customary practice. To assert, as Plaintiffs now do, that

their remedy is the essentially punitive one accorded to victims of tortious conversion, would be an inequitable result and would place them, as the District Court pointed out, in a position far different from that of the other Debentureholders who made timely conversions of their Debentures in 1966. Since it was the objective of Plaintiffs to be treated exactly as those who had heeded Boeing's call, all amounts to be awarded in this case which are based upon the value of Boeing common stock should be computed on the basis of its value of March 29, 1966, the date upon which Plaintiffs' rights to convert their Debentures terminated.

III

CLASS MEMBERS WHO CAN BE IDENTIFIED AND WHO MAKE CLAIMS FOR AMOUNTS DUE ARE NOT ENTITLED TO SHARE IN THOSE SUMS UNCLAIMED BY THE CLASS

In its opinion dated November 8, 1976, the District Court determined that all unregistered holders of the Debentures who failed to convert their Debentures into two shares of Boeing common stock were entitled to receive damages in this action, irrespective of whether they had subsequently redeemed their Debentures or still continued to hold them (A 353-57). Boeing did not take an appeal from this determination. On March 29, 1966, the date when the conversion privilege terminated, two shares of Boeing common stock were worth $316.25 and the redemption value of $100 in principal amount of Debentures was $103.25. Thus, each Debentureholder who failed to convert prior to that date lost $213.00 per $100 in principal amount of Debentures.* As the District Court noted in its

* On March 29, 1966 Boeing common stock closed on the New York Stock Exchange at $158.125 (A 7). Debentureholders who have redeemed their Debentures subsequent to March 29, 1966 have already received $103.25 per $100 in principal amount of Debentures. Debentureholders who have not yet redeemed will receive this amount upon redemption. Because the call of the Debentures caused interest on the Debentures to cease accruing, this $103.25 redemption value is and has been paid exclusive of interest. Thus even if this Court accepts Plaintiffs' contention that prejudgment interest is to be paid, such interest is to be paid only on the actual amounts awarded in excess of the redemption value.

opinion, on March 29, 1966, $1,544,300 in principal amount of unregistered Debentures were outstanding and not converted (A 355). Thus the class as a whole suffered, in the maximum aggregate amount, damages of $3,289,359, exclusive of prejudgment interest (A 364-65).

This sum of $3,289,359 represents the maximum amount to be distributed should all possible class members be identified and file proofs of claim. In its Order and Judgment entered on December 30, 1976 the District Court requested that all parties submit plans for the distribution of these amounts (A 365). All parties realize, however, given the fact that the Debentures were in bearer form and were originally issued nearly twenty years ago, that not all Debentureholders will be identifiable irrespective of the type of notice which is given to them of the results of this case. Further, a certain number of class members, although notified, will undoubtedly fail to claim amounts otherwise due.

Certain of the Plaintiffs raise on appeal, although Judge Ryan did not consider it in either his opinion or Judgment and Order, the question of whether class members who file proper proofs of claims are entitled to receive amounts unclaimed by the class (Kass Br. 14-15). While a question may be raised as to the

propriety of Plaintiffs' raising an issue not the subject of a final order before this Court, Boeing submits that Plaintiffs' position on the issue is incorrect in any event.

Plaintiffs assert that the class members who do file proofs of claim or otherwise demonstrate their entitlement to share in the damages heretofore awarded are entitled to split among themselves those amounts which non-claiming Debentureholders would have received had they too filed claims. Plaintiffs' rationale for this position is that Boeing will otherwise obtain a "bonanza" and in any event since the class will have to pay both its own legal fees and disbursements, it will not be made "whole" (Kass Br. 14-15).

This action is perhaps one of the few Securities Acts class action cases, if not the only one, which has proceeded through trial to a money judgment. It is clear therefore that each Debentureholder who failed to convert his Debentures before the privilege expired lost a discrete sum of money - $213 per $100 in principal amount of Debentures. Since each Debentureholder's damages are so distinctly defined, there is no reason - and Plaintiffs point to none other than vague claims of "equity"* - why Boeing should at this juncture be

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* In New York, judgments are enforceable for twenty years. CPLR § 211. Presumably, a Debentureholder would

compelled to pay to Debentureholders who file claims more as losses than they actually suffered.

The concept of distributing among identifiable class members the shares not claimed by other class members, or a "fluid class" recovery", has been firmly rejected by this Circuit and the Supreme Court. As this Court stated in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), aff'd, 417 U.S. 156 (1974):

> "damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed." 479 F.2d at 1017 (emphasis added).

Accord, In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

Plaintiffs' lone justification for their scheme which could result in each claiming Debentureholder receiving an amount in excess of actual sums due is that since class members will bear the burden of their counsels' fees, they are not going to receive their full due (Kass Br. 14-15). What Plaintiffs are in effect arguing

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have a full twenty years to file a proof of claim for losses and Boeing would be liable. And while Boeing envisions a distribution plan which would require the filing of proofs of claim within a reasonable time after notice, one might question the equity of Plaintiffs' suggestion, both which respect to Boeing and tardy class members whose interests they claim to represent.

* The term "fluid class" recovery was used by the Supreme Court in Eisen. See 417 U.S. at 106.

is that Boeing should pay, at least in part, their legal fees and disbursements.

The Judgment and Order of the District Court correctly provides that legal fees and disbursements are to be borne by the class members who received the benefit of counsels' efforts (A 364). Plaintiffs have not taken an appeal from this part of the District Court's Order and Judgment. In the absence of a specifc federal or state statute authorizing the imposition of the legal fees of one litigant upon the other, each side pays its own. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). There is no federal or state statute involved in the case at bar imposing the costs of Plaintiffs' legal fees upon Boeing. No such authorization is found in the federal Securities Acts, New York law or pursuant to Rule 23 of the Federal Rules of Civil Procedure. The only source available for awarding Plaintiffs their legal fees is out of the sums actually received by the class. City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

Moreover, the law is clear in this Circuit in any event that attorneys' fees paid by any class are governed by the amounts recovered by actual claimants, that is by the benefit conferred, not the maximum

possibly recoverable. City of Detroit v. Grinnell Corp., supra, 495 F.2d at 470; Green v. Wolf Corp., 69 F.R.D. 568, 570-71 (S.D.N.Y. 1976); Blank v. Talley Industries, Inc., 390 F. Supp. 1, 6 (S.D.N.Y. 1975).

Losses in this case sustained by each Debenture-holder are certain and known to the penny. There is no basis in either law, reason or equity to pay to class members, as Plaintiffs demand, more as losses than they actually sustained or to require Boeing to pay legal fees, disbursements and other costs of administration properly borne by the class.

CONCLUSION

The Judgment and Order of the District Court should be affirmed in all respects.

Dated: New York, New York
February 7, 1977

Respectfully submitted,

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